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MADHUB CHUNDER MOZUMDAR v. NOVODEEP CHUNDER PUNDIT.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The evidence has been placed before us, and we think that the conclusion to which the lower Court has come on that evidence is right. As regards the question of law which has been argued, *viz.*, that the present case does not come within the purview of s. 210 of the Indian Penal Code, because the satisfaction of the decree was of such a nature as could not be recognized by the Court executing the decree, we do not think that that contention is valid. The words of the section are: "Whoever fraudulently causes a decree to be executed against any person after it has been satisfied, &c." The words "after it has been satisfied" indicate, in our opinion, the fact of its satisfaction. Merely because the satisfaction is of such a nature that the Court executing the decree could not recognise it would not take the case out of the purview of the section. We therefore dismiss this appeal.

H. T. H. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

GUR BUKSH ROY *alias* GUR BUKSH SINGH (PLAINTIFF) *v.* JEOLAL ROY AND OTHERS (DEFENDANTS).*

1888 *December* 20.

Right of occupancy—Purchase by tenant of fractional share of proprietary interest, Effect of, on acquisition of right of occupancy—Beng. Act VIII of 1869, *s.* 6.

A tenant, who had commenced to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietary interest, and continued to occupy the holding as ryot till the 13th May 1885, when he was dispossessed. On the 30th March 1886 he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that owing to the purchase of the share of the proprietary interest he could not have acquired such right.

Held, that under Beng. Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued

* Appeal from Appellate Decree No. 1062 of 1888, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Bhaugulpore, dated the 24th of March 1888, affirming the decree of Baboo Bemola Churn Mozumdar, Munsiff of Beguserai, dated the 22nd of December 1886.

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to hold the land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding.

IN this suit the plaintiff sought to recover possession of some 4½ bighas of land, alleging that he held the same as tenant and had acquired a right of occupancy therein, and that the defendants had illegally dispossessed him therefrom.

He alleged that 7 bighas—made up of the 4½, the subject of this suit, and 2½ bighas, the subject of an analogous suit against other defendants,—appertained to mouzah Madhurapur and lay in a four-anna *putti* which had been divided by metes and bounds from the other *putti*, and were held by him under a settlement from the former malik, which took place in 1277, taking effect from the 1st Bysack 1278 (13th April 1871). The only question decided in the suit by the lower Courts amongst those in issue on the pleadings was whether the plaintiff had acquired a right of occupancy or not as claimed by him, and the only witness examined by the Munsiff in the case was the plaintiff himself. Upon his evidence the Munsiff dismissed the suit, holding that the plaintiff had not acquired a right of occupancy and could not therefore succeed.

It appeared that in 1285 (1878) the plaintiff purchased a half share in the proprietary interest of the mouzah in the name of his son, and that he had been paying the rent of the entire *jumma* to the several maliks, the collections being made by the putwaris of Raghu Nath, the former proprietor, prior to the purchase of the 8-anna share by the plaintiff, and since such purchase to the putwaris of the purchaser of the other half share and himself, there being only one collection. The suit was instituted on the 30th March 1886, the dispossession complained of being stated to have taken place on the 1st Jeyt 1292 (13th May 1885). Upon the above facts the Munsiff, without going further into the case, held that, as the plaintiff had not acquired a right of occupancy at the date of his purchase of the half share in 1878, he could not be held to have acquired such right at all, as he could not acquire such right as against himself. He accordingly dismissed the suit.

The lower Appellate Court affirmed that decree, and the material portion of the judgment of the Subordinate Judge was as follows:

"There is no doubt that plaintiff could not acquire a right of occupancy from 1278 to 1285, *viz.*, within a period of about seven years, so that at the time of the purchase of the half share of the malik the plaintiff had no right of occupancy. The question next to be seen is whether after the purchase of the proprietary interest (8 annas) of the malik the plaintiff could reckon the subsequent portion of his occupancy for the purpose of creating such right. I think, regard being had to the clear provision of s. 22 of the Tenancy Act, the plaintiff could not tack the period for the purpose of a right of occupancy. A ryoti holding merges in the proprietary interest after the purchase of the latter. A man cannot occupy the double character of landlord and ryot, or make a pretence of paying rent to himself for the purpose of acquiring a right of occupancy—*Lal Bahadoor Singh* v. *Solano* (1). The same principle applies if the holder of the landlord's fractional interest acquires an occupancy right. It is to be determined now whether the plaintiff, having no right of occupancy, is entitled to succeed. I think not. The present suit is not of a possessory character brought within six months, as provided in the Specific Relief Act; he has undoubtedly brought this suit upon title, and failing which he is not entitled to recover—*Debi Churn Boido* v. *Issur Chunder Manjee* (2); see also s. 87, cl. 3, Act VIII of 1885. It is true that under s. 89 of the Act no tenant shall be ejected from his tenure except in execution of a decree; but if the tenant has been out of possession, either legally or illegally, by the admitted landlord, the former must make out a title or right to recover lands from the owner thereof, and in this case the plaintiff has failed."

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* for the appellant.

Mr. *C. Gregory* and Baboo *Mahabeer Sahai* for the respondents.

The judgment of the High Court (MITTER and BEVERLEY, JJ.) was as follows:—

The question that we have to decide in this case is whether, upon the facts found by the lower Courts, the plaintiff has acquired a right of occupancy in respect of the land in dispute.

(1) I. L. R., 10 Calc., 45. (2) I. L. R., 9 Calc., 39.

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The facts of the case are these: The land in dispute lies within a four-anna divided *putti*. It lies wholly within that *putti*, that *putti* being divided by metes and bounds from the other *putti*. It is not stated in the plaint, but it appears from the deposition of the plaintiff who was the only witness examined by the Munsiff, that the land in dispute was let out to him from the beginning of the year 1278 or 1871. It further appears from that deposition that in the year 1878 he acquired by purchase a fractional share in the proprietary right of the *putti* itself. The present suit was brought on the 30th of March 1886, the plaintiff alleging dispossession by the defendants on the 1st Jeyt 1292, that is, some time in May 1885. Upon these facts the Munsiff, accepting them as established for the purpose of raising this question of law, decided that the plaintiff, after his purchase of a fractional share in 1878, could not acquire a right of occupancy. It is clear that if the Munsiff's view is not right the right of occupancy would be deemed to have been acquired by the plaintiff on the completion of twelve years possession, that is to say, some time in the year 1883.

The lower Appellate Court has referred to the provisions of s. 22 of the Bengal Tenancy Act; but, as shown above, if the Munsiff's view was not right, the right must have been acquired by the plaintiff under the old Act, namely, Beng. Act VIII of 1869. If after the Bengal Tenancy Act came into operation there was no such dealing with the property as would bring the present case within any of the clauses of s. 22, the provisions of that section would not be applicable; and there is no such case established by either party. Therefore we may put aside s. 22 altogether from our consideration. The question therefore is, whether under s. 6 of the old Act, namely, Beng. Act VIII of 1869, after the purchase by the plaintiff of a share in the zemindari, he could acquire a right of occupancy in the land in dispute if he continued to hold it after his purchase for twelve years from the date of the commencement of his holding. If after his purchase he was legally in possession of the whole of the disputed land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, we see

no reason why, in the express words of s. 6, he should not be considered to have acquired a right of occupancy after completing his occupancy as a ryot for twelve years. The question of merger does not arise at all in this case. If he had been the proprietor of the entire zemindari, no doubt then in that case the question of merger would have arisen. But here the only right under which he held that share of the disputed land, which is not covered by the share of the zemindari interest which he purchased, was his ryoti title in respect of it. And therefore it must be considered that, unless that title was extinguished by operation of law, he continued to be a ryot in respect of the whole disputed land. We are not aware of any provision of law according to which his ryoti interest in respect of the whole of the disputed land would be extinguished by his purchase of a fractional share of the zemindari. In the case of *Jardine, Skinner & Co.* v. *Sarut Soondari Debi* (1) this question was considered both by the High Court (2) and their Lordships of the Judicial Committee. That was a suit brought by Rani Sarut Soondari to recover possession of a two annas eleven gundas share of upwards of 20,000 bighas of chur land. She was the owner of that fractional share of the zemindari in which the land in dispute in that case was situated. The claim in the suit was resisted upon two grounds: *First*, that under an ijara lease the defendants were entitled to retain possession of the land; and, *secondly*, that they had acquired a right of occupancy in the land because they held it as jotedars before the ijara was granted to them. The High Court was of opinion that the defendants' possession of the land in suit was not that of jotedars, but that they were in possession of it as ijaradars; and that Court further held that as ijaradars they could not create in themselves a right of occupancy. But the Court added that, "even if that were not so, it is impossible to say how the defendants could have acquired either a right of occupancy or a jotedari right in respect of an undivided share of an estate," that is to say, the Court was of opinion that, as the defendants were the ijaradars of a fractional share, and thus represented the zemindar as regards that share,

(1) L. R., 5 I. A., 164.; 3 C. L. R., 140.
(2) 25 W. R., 347.

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their possession as jotedars, even if it be accepted as true as against the owners of an undivided fractional share, could not confer upon them a right of occupancy. But the Judicial Committee on appeal were of opinion that this view was not correct. They said: "Their Lordships do not concur in the view thus expressed by the High Court to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate."

We are, therefore, of opinion that, if the plaintiff's case as stated in the plaint and supplemented by his deposition be established, he would be entitled to a decree on the ground that he has a right of occupancy in the land in suit. But the Munsiff did not take the other evidence of the plaintiff or any evidence on behalf of the defendants. We, therefore, set aside the decrees of the lower Courts and remand this case to the Court of first instance for completion of the trial.

Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

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December 19.

SHEONATH DOSS (DECREE-HOLDER) *v.* JANKI PROSAD SINGH AND OTHERS (JUDGMENT-DEBTORS.)*

Sale in execution of decree—Civil Procedure Code, 1882, *s.* 294—*Decree-holder, Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy—Practice.*

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart* v. *Tara Prasanna Mukherji* (1) distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.

*Appeal from Order No. 360 of 1888, against the order of J. Tweedie, Esq., Judge of Shahabad, dated the 22nd of June 1888, modifying the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 24th of January 1888.

(1) I. L. R., 11 Calc., 718.

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The permission to a mortgagee to bid should be very cautiously granted, and only when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale proclamation has been duly published.

IN execution of a mortgage decree for Rs. 5,088, obtained by one Sheonath Doss against Janki Prosad and others, four bonds (the subject of the mortgage), which had been executed in favor of the mortgagors by third persons, were put up for sale and purchased for Rs. 685 by the decree-holder, who had obtained permission to buy at such sale. On the 27th January 1888 the third persons above referred to paid into Court Rs. 5,812 to the credit of the person or persons (whoever they might be) then entitled to the money under such bonds. The exact amount payable as principal and interest on such bonds on the 7th January 1887 amounted to Rs. 5,719. The decree-holder, subsequently to the sale in execution, assigned one of such bonds, of the value of Rs. 1,000, to a stranger for Rs. 300; and subsequently applied for further issue of execution against other properties of his judgment-debtors for the unsatisfied balance of his decree, contending that he had become by his purchase in execution the absolute owner of these bonds, and was still entitled to satisfaction of the remainder of the judgment-debt from his judgment-debtors. The judgment-debtors objected to the issue of further execution.

The Subordinate Judge of Shahabad held, on the authority of *Hart* v. *Tara Prasanna Mukherji* (1) that the decree-holder having become himself the purchaser of the bonds at the sale in execution of his own decree, was bound to prove that the property purchased by him had realized a fair amount; and that this question was one which the Court was bound strictly to enquire into before the decree-holder could be allowed to take out further execution; and under the circumstances of the case he eventually directed that execution should be stayed, and that the decree-holder would be at liberty, on application made for that purpose, to take out from the Court the sum of Rs. 5,812 deposited by the third parties above referred to, after giving notice to the person to whom he had assigned one of the bonds, part of the subject of his mortgage.

(1) I. L. R., 11 Calc., 718.

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The decree-holder appealed to the District Judge, who held that in common honesty all the decree-holder was entitled to was the amount due on the bonds on the 7th Feburary 1887, *viz.*, Rs. 5,719; but that as he had assigned to a stranger one of such bonds of the value of Rs. 1,000, that sum should be deducted from the Rs. 5,719, and the price for which it was so assigned, *viz.*, Rs. 300, should be added thereto after such deduction, making the value of the bonds on the 7th February to have been Rs. 5,019; and that as the judgment-debt amounted to Rs. 5,088, there remained only a sum of Rs. 69 due by the judgment-debtors. He therefore varied the order of the lower Court and found that there was due to the decree-holder Rs. 69 plus costs and interest up to realization.

The decree-holder appealed to the High Court.

Mr. *R. E. Twidale* for the appellant.—The judgment-debtors are only entitled to be credited with Rs. 685, and for the balance of the judgment-debt the decree-holder is entitled to issue out further execution. The lower Courts have not kept in view s. 294 of the Code of Civil Procedure, which lays down that the purchase-money is to be set off against the amount due under the decree and satisfaction entered up to that extent; and also were in error in holding that the money paid into Court by third persons should be taken in satisfaction of the appellant's decree.

The case of *Hart* v. *Tara Prasanna Mukherji* (1) has no application to a case of this kind.

Moulvie *Mahomed Yusuf* for the respondents.—The decree-holder, after purchasing at the execution sale, became trustee for the mortgagors, and held the bonds only subject to satisfaction of his decree. I rely on *Hart* v. *Tara Prasanna Mukherji* (1).

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

BANERJEE, J.—The only question raised in this appeal, and the only question tried in the Courts below, is, whether the mortgagee, who has bought the mortgaged property at a sale in execution of a decree upon the mortgage bond, is at liberty to take out further execution for the balance of the amount decreed left after deducting

(1) I. L. R., 11 Calc., 718.

the price for which the property was sold; or whether he is bound to give the mortgagor, judgment-debtor, credit, not only for such price, but for the real value of the property sold to be ascertained by the Court; in other words, whether the mortgagee, by his purchase, became the absolute owner of the property, or took it in trust for the mortgagor. Both the Courts below have answered this question in favour of the mortgagor, and the lower Appellate Court has ordered execution to issue only for the balance left after deducting from the amount of the decree what it found to be the real value of the property sold. We think the decision of the Courts below is not right.

The rule deducible from *Downes* v. *Grazebrook* (1); *In re Bloye's Trust* (2); *Tennant* v. *Trenchard* (3); *Martinson* v. *Clowes* (4); and other cases bearing on the question which are referred to in White and Tudor's Notes to *Fox* v. *Mackreth*, is thus stated in Fisher on Mortgage, and other well-known text books, that neither the mortgagee, whether he claims under an ordinary power or under a trust for sale, nor his trustee, can buy the mortgaged property, unless, when the sale is made by the Court, he has obtained leave to bid, and if the mortgagee be a trustee he will not have leave to bid where the *cestui que trust* objects, unless attempts to sell to others have failed, and that the same rule applies to a pledgee. See Fisher on Mortgage, 4th Edition, p 458; Coote on Mortgage, 4th Edition, p. 257; Dart on Vendors and Purchasers, 6th Edition, pages 35 and 41.

In the second of the above cases Lord Cottenham explains the reason of the prohibitory rule to be this, that it would be improper to place a person in a situation in which his interest, as intending purchaser, might conflict with his duty to secure the highest price for the property to be sold; and in *Tennant* v. *Trenchard* (3) Lord Hatherley points out that, if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the trustee might be allowed to make proposals and to become the purchaser.

(1) 3 Mer., 200.
(2) 1 Mac. & G., 488.
(3) L. R., 4 Ch. Ap., 537.
(4) L. R., 21 Ch. D., 857.

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The above rule is in perfect accord with reason and common sense. While it prevents the mortgagee from taking any unfair advantage of his position by prohibiting him to buy, it removes the prohibition, to prevent the very result it was meant to guard against, when that becomes necessary. But a hard and fast rule that the mortgagee can never become the purchaser is not only unnecessary but would be inexpedient, even in the interests of the mortgagor. In the case of *Warner* v. *Jacob* (1) it was held that the mortgagee selling was not in a fiduciary position towards the mortgagor, and in *Coaks* v. *Boswell* (2) under somewhat similar circumstances it was held that the leave to bid put an end to the disability to purchase under which the party may have laboured.

The decree-holder, under our Code of Civil Procedure, can only buy with leave of the Court, and when the mortgagee decree-holder has bought the mortgaged property with such leave, we do not find any reason or authority for holding that he takes the property in trust for the mortgagor.

The only authority referred to by the Court below and relied upon by the respondent in this case is the case of *Hart* v. *Tara Prasanna Mukherji* (3); but that case is clearly distinguishable from the present. There the question was not one between the decree-holder mortgagee and the judgment-debtor mortgagor, but was one between the decree-holder and other creditors of the judgment-debtor; and though in one place the rule laid down by the learned Judges is stated somewhat too broadly, the distinction pointed out above is clear from another part of the judgment where the reason of the rule is stated. "It would manifestly be inequitable," say the learned Judges, "to allow a mortgagee to buy in the mortgaged property at an auction for a sum far below its real value, and then to go on against other property of the mortgagor to the injury of the other creditors." This makes the distinction between that case and the present one perfectly clear.

Whilst we attach so much importance to the leave of the Court to the decree-holder to bid, and consider that it removes all

(1) L. R., 20 Ch. D., 220. (2) L. R., 11 Ap. Cases, 232.
(3) I. L. R., 11 Calc., 718.

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disability in him to bid, we deem it our duty to observe that such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given only after some enquiry, that the sale proclamation has been duly published. And if, after all, the mortgagor, judgment-debtor, is in any way injured, he has ample remedy provided for him in the Code. He can, under s. 294, question the propriety of the leave to bid, by showing, either that it was obtained by misrepresentation, or that it was granted through inadvertence and without the exercise of judicial discretion by the Court, and he can have the sale set aside under s. 311, or obtain compensation under s. 298 of the Code, according to the nature of the property sold.

The present may be a hard case; but if there was any real hardship, the respondent was not without remedy; and for aught we know he may still have his remedy. All we say at present is, that the decision of the Court below, so far as it goes, is incorrect, and that the application of the decree-holder for further execution should be granted, subject, of course, to any objections or proceedings that it may still be open to the judgment-debtor to take. The appeal must be decreed with costs.

T. A. P. *Appeal decreed.*

Before Mr. Justice Pigot and Mr. Justice Macpherson.

1888 *June* 15.

CHUNDER COOMAR (ONE OF THE DEFENDANTS) *v.* HURBUNS SAHAI (PLAINTIFF) AND ANOTHER (DEFENDANTS).*

Benami transaction—Estoppel—Misrepresentation—Heir, when bound by the acts of ancestor—Mitakshara Law—Sale by a co-parcener, Effect of.

B purchased some property from *D* (a member of a joint Mitakshara family) in the name of his wife *K* with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in

* Appeal from Original Decree No. 247 of 1886, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Shahabad, dated the 11th of September 1886.

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fact continued to treat the property as her own. During *S*'s minority, *C* the nephew of *D*, who was now of age, brought a suit for pre-emption against *K* in respect of this property, and obtained a consent decree under which he took possession. *S*, then, on attaining majority, instituted a suit against *C* for the recovery of the property, as the heir and representative of his father, on the ground that *K* was a mere benamidar. The defence taken by *C*, amongst others, was that *K* was the real owner he believed her to be.

Held, that on the authority of *Luchman Chunder Geer Gossain* v. *Kally Churn Singh* (1) it was a good defence, for, even on the assumption that the purchase was benami, *S* as heir of *B* was bound by the misrepresentation of the latter.

Held, also, that the sale by *D* as against *C* was bad under the Mitakshara law, inasmuch as it was an appropriation by him, without any partition, of part of joint family property.

THIS was an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. Hurbuns Sahai, the plaintiff, brought this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276 (15th October 1868), leaving the plaintiff, then an infant, and Ruttonjote Koer (defendant No. 2), his widow and mother of the plaintiff. The plaintiff alleged that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant Chunder Coomar's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote Koer, Lala Bhugwandut was the real owner. He further alleged that after his father's death, and while he was an infant, in 1875, the defendant Chunder Coomar brought an unfounded suit of pre-emption against Ruttonjote; and by compromise with her obtained a decree for the property on the 15th June 1875, and took possession of it. The plaintiff also alleged that he was the real owner; that his mother Ruttonjote Koer had no right to compromise the suit; that undue influence, threats and coercion had been used to induce her to enter into the compromise; and that the decree was obtained fraudulently and illegally. He prayed for a declaration to that effect; that the deed of compromise of 12th May 1875, and the decree of 15th June 1875, be set aside; that he be put in possession of the property; and for mesne profits. He offered to repay to Chunder Coomar the sum of Rs. 7,080-2-0, the amount alleged to have

(1) 19 W. R., 292.

been paid by him to Ruttonjote Koer under the consent decree in the pre-emption suit. The defendant Ruttonjote Koer did not put in an appearance, although duly summoned. Chunder Coomar alleged that he and his paternal uncle Juneswar Das were members of a joint undivided Hindu family governed by the Mitakshara law; that no division of any description had ever taken place between them; and that the property in dispute covered by the sale of 28th September 1866 was part of property acquired with joint family funds. He denied coercion, undue influence and fraud. His defence shortly was, that Ruttonjote Koer was the real owner whom he believed her to be, under the deed of 28th September 1866; that the decree of the 15th June 1875, as between the plaintiff and the defendant, was binding on the plaintiff; that, even if Ruttonjote Koer was no more than a mere manager for the plaintiff, her compromise was the act of a prudent manager and therefore binding on the plaintiff; that under no circumstances could the plaintiff recover inasmuch as the deed of sale of 28th September 1866 from Juneswar Das was a conveyance of part of the property of a joint Mitakshara family by one member of the family asserting it to be his own separate and distinct property; and that the sale was void as against him.

The Subordinate Judge found that neither undue influence nor coercion had been used, and that the case of fraud was false; that when Ruttonjote Koer applied for a certificate of guardianship to her son, the plaintiff, under Act XL of 1858, she excluded the property in suit from the list of properties which she had filed; that Lala Bhugwandut purchased the property in dispute in the name of his wife Ruttonjote Koer with the object of concealing the fact that he was the purchaser from the Maharajah of Dumraon, in whose service the Lala was, and whose relatives were the former owners, and further lest, in the event of any dispute arising out of this property, his exclusive property might be prejudiced and attached with debt. The Judge also found that Chunder Coomar, Purbhu Das, his father, and Juneswar Das were members of a joint Mitakshara family; and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family and managed the business of the house. He held that

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the sale of 28th September 1866 by Juneswar was valid; that Ruttonjote was a mere benamidar; and that everything that passed under the sale passed to Bhugwandut. He also found that the compromise of 12th May 1875 was, so far as Ruttonjote was concerned, *bonâ fide* for the benefit of her son, but held that the compromise could not bind the plaintiff.

The Judge, partially decreed the suit. He set aside the compromise and consent decree, and gave the plaintiff possession, but disallowed mesne profits.

Against this decree Chunder Coomar appealed to the High Court.

The *Advocate-General* (*Sir G. C. Paul*) and Baboos *Unnoda Prosad Banerji*, *Mohesh Chunder Chowdhry*, and *Tarapodo Chowdhry* for the appellant.

Mr. *C. Gregory* and Baboos *Guru Das Banerjee* and *Oukhil Chunder Sen* for the respondents.

The judgment of the Court (PIGOT and MACPHERSON, JJ.) was as follows:—

This is an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. The plaintiff brings this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276, leaving the plaintiff, then an infant, and Ruttonjote, his widow, and mother of the plaintiff. The plaintiff says that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote, Lala Bhugwandut was the real owner in the name of Ruttonjote. The plaintiff says that after his father's death, and while he was an infant, the defendant brought an unfounded suit of pre-emption against Ruttonjote in respect of this property, and by compromise with her obtained a decree for the property and took possession of it. He says that he was the real owner, that Ruttonjote had no right to compromise the suit, that the decree was obtained fraudulently and illegally; and he asks for a declaration to that effect, that he be put into possession of the property and for mesne profits; offering, if this Court think's fit, to repay to defendant the sum of Rs. 7,080-2-0, being the amount said to have been paid

by defendant to Ruttonjote under the consent decree in the pre-emption suit. The defence is shortly this: (*a*) Ruttonjote was the real owner defendant believed her to be. (*b*) The decree is as between plaintiff and defendant binding on plaintiff. (*c*) Even if Ruttonjote was no more than a manager for the plaintiff, her compromise was the act of a prudent manager and was binding on the plaintiff. (*d*) Under no circumstances can the plaintiff recover, inasmuch as the deed of sale from Juneswar was a conveyance of part of the property of a Mitakshara family, by one member of the family, under pretence that it was his own, and that the sale was void as against the defendant. These are the substantial points made by defendant in his written statement, though stated in a different order. He of course denies fraud, &c., in the decree. A description of the property claimed in this suit and of the manner and the dates of its acquisition is given in the plaint as follows:

1. That Baboo Dyal Singh, deceased, was the proprietor of the entire 16 annas of mehal Athur, pergunnah Bhojepur, to which the undermentioned mouzahs appertain.

2. That in accordance with the conditions specified in the taksimnamah executed by Baboo Dyal Singh, in the mehal aforesaid, 6 annas came into the possession of Baboo Rip Bhunjun Singh, 5 annas into that of Baboo Goman Bhunjun Singh, and 5 annas into that of Baboo Ari Bhunjun Singh, sons of Baboo Dyal Singh.

3. That the entire 16 annas of the aforesaid mehal was mortgaged on behalf of Baboo Rip Bhunjun and Baboo Goman Bhunjun Singh for selves and as guardians of Baboo Rip Bhunjun Singh, minor, to Juneswar Das for self and as guardian of Baboo Chunder Coomar, and out of the mouzahs aforesaid appertaining to the mehal aforementioned, mouzah Athur, mouzah Kunhuan and mouzah Runbirpore were under two zurpeshgi leases, severally dated 17th February 1862 and 21st September 1860, in the possession of Baboo Juneswar Das for self and as guardian of Baboo Chunder Coomar.

4. That Juneswar Das, for self and as guardian of Chunder Coomar, obtained a decree on the basis of his mortgage bond, and caused the shares of Baboo Rip Bhunjun Singh and Baboo Goman

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Bhunjun Singh in mehal Athur aforesaid to be sold at auction, and purchased them himself on the 4th March 1865.

5. That after the purchase made at auction Juneswar Das, for self and as guardian for Chunder Coomar, held the entire 16 annas of mouzah Athur, mouzah Kunhuan and mouzah Runbirpore in possession under zurpeshgi lease, and entered into possession of 11 annas of the entire mehal by virtue of purchase at auction, and out of this one-half was the share of Juneswar Das, and the other half that of Chunder Coomar.

6. That out of half of the share which belonged to Juneswar Das under the zurpeshgi deed and the auction purchase one-fourth was sold by Juneswar Das to Lala Bhugwandut, father of the plaintiff, under the deed of sale dated 28th September 1866, and possession made over, and that Lala Bhugwandut got that deed of sale executed in the fictitious name of Mussummat Ruttonjote Koer, his wife.

7. That under the deed of sale above adverted to Lala Bhugwandut became proprietor and holder of 1 anna 4 pie 10 krants in the entire mehal Athur as auction-purchaser, and in that mehal in mouzah Athur, mouzah Kunhuan and mouzah Runbirpore he came to hold possession of 2 annas share under a zurpeshgi lease.

The Judge in the Court below held that the case of fraud, (which consisted of a charge of intimidating Ruttonjote by threatening her to kill her son by sorcery), was false. He held that the purchase in Ruttonjote's name was a benami purchase, and that everything that passed under the deed of sale passed to Lala Bhugwandut. He found that Purbhu Das, defendant's father, Juneswar Das, his uncle, and the defendant were members of a joint Mitakshara family, and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family.

We accept these findings as correct.

The Judge further held: (*a*) that the compromise and consent decree could not bind the plaintiff; (*b*) that, although the defendant's family were joint, Juneswar was, as to the property of which that in dispute was one-fourth, separate owner, and capable of giving a good title to it by sale; and (*c*) that even if he were not, defendant could not now insist on the defect of title, as he had

not made it a ground of claim when he instituted the pre-emption suit.

As to the first point, the Judge expresses no opinion upon the question whether defendant had, at the time he entered into the compromise, notice that Ruttonjote was a benamidar. The defendant wholly denies that he had; and we find, upon the evidence that there is no ground for finding that he had, and that the facts of the case are not such as to justify a Court in fixing him with constructive notice of the plaintiff's rights such as they were. Not merely was the purchase made in Ruttonjote's name, but the reasons for the use of her name by Lala Bhugwandut are given by the Judge. It was desired to conceal from the Maharajah of Dumraon, in whose service Lala was, that he had purchased property of persons who were the Maharajah's relatives; and there was the further very substantial reason that the disputed properties were heavily encumbered, as Sheo Gholam, witness No. 7, says: "He made the purchase in the name of Ruttonjote with a view that in case of dispute arising his exclusive property might not be prejudiced, and no liability in consequence of debt might attach to it," and then mentions also the consideration about the Maharajah.

It is plain that the concealment (assuming the purchase to have been a benami one) was intended to be effectual. There seems no reason to doubt that it was effectual. It is plain that after Lala's death the property continued to be treated as Ruttonjote's. She obtained a certificate of guardianship of her son under Act XL of 1858, but this property was not included in it. A number of exhibits have been put in showing that for years, and down to near the time of the pre-emption suit, the property was managed and proceedings relating to it conducted in her name. There is not a fact in evidence such as could be calculated to put a purchaser from her (supposing for the moment that the defendant was such) upon enquiry, save the fact that plaintiff was her son; and the fact that she had excluded the properties from the certificate of guardianship is probably a sufficient indication of the answer that might have been expected from her to an enquiry as to the ownership of the property.

Further, had the defendant known or suspected the ownership

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of the plaintiff, there seems no reason why he should not have made him a party to the suit. His mother was his guardian. She might have been enabled to defend the suit in respect of this property as his guardian. The Judge finds that the compromise was, so far as Ruttonjote was concerned, a *bonâ fide* compromise for the benefit of her son in respect of property which was then heavily encumbered; and this would have justified her as his guardian in what she did. On the whole, we see no reason to doubt that were the defendant in this case simply a purchaser for valuable consideration, he would be entitled to whatever defence *bona fides*, and absence of notice of plaintiffs' claim, would entitle him to. That such a defence would be, in such a case as this, complete is decided by the case in the Privy Council of *Luchmun Chunder Geer Gossain* v. *Kâlly Churn Singh* (1), where it was held, overruling the decision of this Court, that such a defence is good against an heir of the person who created the benami, even although an infant at the time, when, after the death of the ancestor, a sale is made by the benamidar, in breach of his trust, to a *bonâ fide* purchaser without notice, there being a continuing misrepresentation by the ancestor by which the heir is bound.

We can see no distinction in favour of the plaintiff between the present case and the case of a purchaser. If Ruttonjote was by the act of Lala Bhugwandut held out as the real owner, and so competent to make a good title on sale, she was at least as much so held out as such, as being competent to defend the title obtained by the sale—at any rate, as against a member of the vendor's family claiming that the sale was in derogation of that member's rights, and so was capable of entering into a compromise with him should she honestly think the title defective. No doubt the compromise may very possibly have been arranged before the suit was filed. There is nothing to suggest that this was the case with the preliminary *mowasibut* and *istashad* which long preceded the actual filing of the pre-emption suit. Nor should it be omitted from consideration that pre-emption is in fact a sale enforced by law, and that the price paid by Lala Bhugwandut was actually paid back to Ruttonjote.

(1) 19 W. R., 292.

The Subordinate Judge has said that the performance by Chunder Coomar of the preliminaries required by the Mahomedan law in a case of pre-emption do not appear to have been properly performed. That question was not before him save so far as it might bear on the question of fraud, which he has negatived; for he has found that the compromise was *bonâ fide* made by Ruttonjote so far as she was concerned, for the benefit of her son. If she had power to defend the suit, the decree is binding; if not, it is quite immaterial whether the preliminaries were performed or not in compliance with the strict Mahomedan law of pre-emption or whatever modification of it, if any, may apply amongst Hindus in this part of the country, where, by custom, the right of pre-emption exists amongst them. For these reasons we are of opinion that upon this point the Judge was in error, that the plaintiff is bound by the compromise and the decree in pursuance of it, and that on this ground alone the suit ought to have been dismissed.

We may observe that the case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) was not cited before us, nor is it referred to in Mr. Mayne's chapter on benami, nor in Mr. Woodman's Digest under that title (2); nor, so far as the reports show, does it appear to have been cited in any case in this Court. It is a decision of great importance, as showing that, in some cases, the heir of one who purchases benami may be bound as between him and a purchaser from the benamidar by that act of his ancestor, irrespective of any act or omission of his own whatever, and even although a minor when his ancestor's conduct was acted on by such purchaser.

Although our decision upon this point is decisive on the appeal, we think we should also decide the other question argued before us. Purbhu Das, Juneswar Das, and the defendant, who is the son of Purbhu Das, were members of a joint family living under the Mitakshara law. Juneswar Das died in October 1874. The date of the death of Purbhu Das does not appear, but from a deposition of Juneswar Das, made on the 19th August 1872 before the Subordinate Judge of Shahabad, put in in this case and marked

(1) 19 W. R., 292.

(2) It appears under title Estoppel—Estoppel by Conduct, case 168.—ED.

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Exhibit 22, it does appear that at that date Purbhu Das was alive—a fact which appears to have escaped the attention of the lower Court and of learned counsel in this. Purbhu Das had nominally renounced the world. The lower Court finds that, though it was given out that he had done so, he had not really done so, but managed the business of his house. The brothers appear to have become possessed of considerable means, to have bought a good deal of zemindari property, and to have been much engaged in law suits, which latter pursuit is referred to in the deposition above mentioned as though it were part of their business, as it possibly was.

But, while holding that the status of the family was joint, the Subordinate Judge holds that the kobala of September 1866 was valid under the Mitakshara law. He does so chiefly on the ground that Juneswar in that kobala recites that the original purchase at auction was made half for himself and half for Chunder Coomar, and in reliance on certain expressions used by Chunder Coomar in his evidence in this case, in his plaint in the pre-emption case, and in an objection filed by him on December 13th, 1877, all of which, he appears to think, bar Chunder Coomar from now disputing that the property was joint. We think the construction put upon these expressions by the Subordinate Judge is erroneous; but, were it otherwise, they could not have the effect he attributes to them. Chunder Coomar's evidence in this case, in which he explicitly sets up the joint character of the property, cannot on the face of it be taken as an admission of a fact which he comes into Court to deny, while the language used by him in proceedings to which plaintiff was not a party could not bind him towards the plaintiff, even if it contained, as we do not think it does, admissions on his part that the property was not joint; nor can the language of the kobala have the effect attributed to it, for Juneswar, if he was selling property which he had no right to sell, could not confer that right upon himself by asserting that he had it. It is not suggested that the money advanced on the zurpeshgi leases, or the money which was the consideration for the auction sale, were not joint family funds; and the property which passed under those transactions became clearly joint family property.

Then the fact that Purbhu Das was an active member, as the Judge found, of the joint family, and was so at the time of the kobala, which latter fact was not mentioned in argument before us, is conclusive. The family did not consist of two persons jointly interested in the family property, but of three persons so interested. We take the Judge's finding to negative the supposition that Juneswar was the manager of the family. But even if he was, this sale did not pretend to be made by him in that capacity; nor was there any family object to be gained by it. It was simply an appropriation by him, without any partition, of part of the family property. Nor does the doctrine lately introduced, that sons are bound by force of a pious obligation incumbent on them to make good the acts of their father, extend to nephews in respect of the acts of their uncle, or to brothers of the acts of brothers. No doubt the Mitakshara law has been a good deal worn away by the decisions of recent years, which it is our duty to follow. But we are not aware of any authority according to which the sale by Juneswar in the present case could be sustained.

We think that the plaintiff has failed to show a good title to the property claimed, and that on this ground also the suit should have been dismissed.

As to the view taken by the Subordinate Judge, that having regard to s. 13 of the Code of Civil Procedure and the case of *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1), the defendant is not entitled to rely on this ground, as he did not put it forward when he brought his suit for pre-emption; we think it enough to point out that this suit is not between the same parties as the former suit. We should hesitate before holding that the bar arising from the acts of his father which, as we have decided, precludes the plaintiff from disputing Ruttonjote's right to compromise the pre-emption suit, had such an operation as to entitle him to treat it as if, for all purposes, it had been brought against him, and so to avail himself, against the defendant, of s. 13, Explanation 2 of the Civil Procedure Code. Were it necessary to deal with this question, we should have to consider the bearing upon it of the recent decision of the Privy Council in *Amanut Bibee* v. *Imdad Hossein* (2), decided

(1) I. L. R., 2 Calc., 152. (2) L. R., 15 I. Ap., 106.

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on March 16th of this year. But for the purposes of this appeal, it is needless to determine that question. If the plaintiff is estopped, he cannot recover, for that reason, in this suit. If he is not, defendant is not barred by s. 13 from showing that under the Mitakshara law plaintiff has no title; and in either case the suit must fail.

We should add that had we felt able to sustain the decree of the Subordinate Judge, we should have felt some difficulty in doing so without giving the defendant an opportunity of showing how far, if at all, the very great increase in the value of the property since the pre-emption suit is attributable to the paying off of incumbrances at that time affecting it by the defendant. It has admittedly doubled in value at the least.

We set aside the decree of the Subordinate Judge, and dismiss the suit with all costs here and in the original Court.

C. D. P. *Appeal allowed.*

Before Mr. Justice Pigot and Mr. Justice Rampini.

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SARAT CHUNDER DEY AND OTHERS (DEFENDANTS 1 to 5) *v.* GOPAL CHUNDER LAHA (PLAINTIFF), AND OTHERS (DEFENDANTS 6 TO 10).*

Benami transaction—Estoppel—Persons claiming under person who creates the benami.

The mere fact of a benami transfer does not in itself constitute such a misrepresentation as to bind all persons claiming under the person who creates the benami.

O made a benami gift of his property to his wife *A*. The deed of gift was registered and purported to be made in consideration of the fixed dower due to *A*. There was no mutation of names; but *O* managed the property as *A's* am-muktar under a general power-of-attorney executed by her in his favor. On the death of *O*, *A* mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against *A*, the mortgaged property was purchased by the defendants. On the death of *A*, *H* and *R*, the son and daughter of *A*, sold their shares in the property, which they had inherited from their father *O*, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of *H* and *R*, and for partition.

* Appeal from Appellate Decree No. 1560 of 1887, against the decree of H. Beveridge, Esq., Additional Judge of 24-Pergunnahs, dated the 18th June 1887, reversing the decree of Baboo Karuna Das Bose, Munsiff of Sealdah, dated the 30th December, 1886.

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Held, that the acts of *O* were not such as to constitute an estoppel as against his heirs, and, therefore, the plaintiff was entitled to the relief he sought.

Luchmun Chunder Geer Gossain v. *Kally Churn Singh* (1) explained.

SUIT for declaration of title and partition.

Umed Ali Ostagar died on the 6th August 1879, possessed of considerable property, and leaving him surviving his widow Azru Bibi, Ahmed Hossein, Rohimunnessa and Bunnijan, his children by Azru, and a son Palkjan by a second wife who predeceased him. Some time before his death, on the 4th January 1878, Umed Ali by a deed, which purported to be a *hiba-bil-ewaz*, or a deed of gift in consideration of a sum of Rs. 11,361 due to his wife Azru in respect of her fixed dower, conveyed, amongst other properties, the property in dispute in this suit to Azru Bibi absolutely. There was no mutation of names; but Azru executed a general power-of-attorney in favor of her husband Umed Ali, who, under color of such authority, managed the properties as her am-muktar.

On the strength of this deed Azru Bibi, on the 22nd April 1880, mortgaged the properties covered by it to one Kalimuddin to secure the repayment to him of an advance of Rs. 2,000. The mortgage-deed was attested by Ahmed Hossein, who held a power-of-attorney from her sister Rohimunnessa, dated the 17th December 1879. The mortgage debt was not repaid, and Kalimuddin, in 1881, brought a suit against Azru Bibi on the mortgage in the Court of the Second Subordinate Judge of the 24-Pergunnahs, and obtained a decree on the 7th December of the same year. At an auction sale on the 15th May 1882 in execution of this decree, Khetter Mohun Dey and Grish Chunder Dey, the predecessors in title of the defendants Nos. 1 to 5, purchased the mortgaged properties, and obtained possession. Prior to the decree in the year 1881, Palkjan instituted a suit in the original side of the High Court for the administration of the estate of his father Umed Ali Ostagar. The sale in execution of the mortgage decree took place before the written statements, in which Ahmed Hossein and Rohimunnessa supported the *hiba*, were filed by them in Palkjan's suit.

(1) 19 W. R. 292.

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On the 4th May 1884 Azru died; and, on the 28th July 1885, Ahmed Hossein and Rohimunnessa, the son and daughter of Azru, sold their respective shares in the property in this suit, which they had inherited from their father Umed Ali Ostagar, to the plaintiff Gopal Chunder Laha, who took a conveyance of the same in the name of his servant Janoki Nath Chatterjee, defendant No. 10. On the strength of his purchase the plaintiff Gopal Chunder Laha, in December 1885, instituted a suit in the Court of the Munsiff of Sealdah for a declaration of his right to the said shares of Ahmed Hossein and Rohimunnessa in the property in suit, and for partition. He also prayed for the removal of a pucca wall erected by the defendants Nos. 1 to 5.

The material issues tried by the Court of first instance were:—Did Umed Ali make a valid gift of the property to his wife? Even if the gift be not valid, is not the plaintiff estopped from disputing its validity by the conduct of his vendors and their predecessors in title. There was no dispute as to the share the plaintiff would be entitled to if the *hiba* was declared invalid.

It was contended, on behalf of the plaintiff, that the deed of 4th January 1879 was a benami transaction; that it did not convey any estate in the property; and that, as against the defendants Nos. 1 to 5, the plaintiff was entitled to the shares of Ahmed Hossein and Rohimunnessa. It was also contended that the mortgage of the 22nd April 1880, to enforce which the suit of 1881 was brought, did not pass any interest in the property, and that, therefore, the defendants Nos. 1 to 5 did not acquire any interest in it under the sale of the 15th May 1882 in execution of the mortgage decree.

The defendants Nos. 1 to 5 contended *inter alia* that the *hiba* was a valid document, possession having been given under it to Azru Bibi, that the plaintiff was estopped by the conduct of his vendors and their predecessors in title from questioning the validity of the *hiba*, and that they were *bonâ fide* purchasers for value without notice.

The Munsiff found that there was no consideration for the *hiba*; that Umed Ali had proclaimed to the world that he had made a valid *hiba* of his property in favor of his wife Azru Bibi; that he had given effect to it by putting her into possession; that he had

allowed his wife to use her own seal in respect of the property; and that, as his wife's am-muktar, he led the world to believe that she was the real owner of the property. He also found that, after Umed Ali's death, Azru Bibi dealt with the property as her own. He further found that the defendants Nos. 1 to 5 were *bonâ fide* purchasers for value without notice, and the plaintiff's purchase was only an unconscionable bargain.

He held that the *hiba* as a deed of dower was invalid, but that it was valid and binding as a deed of gift, seisin having been given in accordance with the requirements of the Mahomedan Law. He also held that the plaintiff was estopped from questioning the validity of the *hiba* by the conduct of his vendors and their predecessors in title. Accordingly the Munsiff dismissed the suit.

The plaintiff appealed to the Additional Judge of the 24-Pergunnahs. The Judge agreed with the Munsiff in holding that the *hiba* was invalid as a deed of dower and as being without consideration; but, as he was of opinion that there was no evidence that Azru Bibi did get possession until after the death of her husband, he held that the *hiba* was also invalid as a deed of gift. Upon the question of estoppel, he found that Umed Ali did nothing beyond execute and register the deed of gift; that there was no evidence that Umed Ali had held out Azru Bibi to the world as the owner of the property, or that he had parted with possession of it. He, therefore, held that the conduct of Umed Ali fell far short of what was required to constitute an estoppel. He also held that neither Ahmed Hossein nor Rohimunnessa was estopped from disputing the *hiba*, and consequently the plaintiff was not. The Judge further held that the existence of the suit in the High Court, in which the validity of the *hiba* was in question, went far to disprove the plea that the defendants were *bonâ fide* purchasers for value and without notice. He accordingly allowed the appeal, and ordered the removal of the wall erected by the defendants.

Defendants Nos. 1 to 5 appealed to the High Court.

Mr. *Woodroffe*, Baboo *Nil Madhub Bose* and Baboo *Shib Chund Paul* for the appellants.

Mr. *Evans*, Baboo *Pran Nath Pundit* and Baboo *Okhoy Coomar Banerjee* for the respondents.

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The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

The plaintiff sues as purchaser of the shares in certain property of Ahmed Hossein and Rohimunnessa, the son and daughter of one Umed Ali Ostagar, of whose estate the property in question formed part, and who died in the year 1879, leaving him surviving his widow Azru, Ahmed Hossein, Rohimunnessa, and Bunnijan, his children by Azru, and a son Palkjan, by a second wife. The defendants purchased the property, in which the plaintiff claims the shares of Ahmed and Rohimunnessa, at an execution sale, which took place on the 15th May 1882. The sale at which the defendant purchased this property was in execution of a decree in a mortgage suit brought by one Kalimuddin, the mortgagee, in 1881, and the decree in which was made in December 1881. The plaintiff says that the mortgage, to enforce which the suit of 1881 was brought, was ineffectual to pass any interest in the property, and that no interest in the property passed to the defendant under the sale on the 15th May 1882 in execution of the mortgage decree. The mortgage was entered into between Azru Bibi, the widow of the deceased Umed Ali Ostagar, and Kalimuddin. Azru claimed to be entitled to the property mortgaged under a *hiba* executed by her husband on the 4th January 1878, by which *hiba*, in consideration of the sum of Rs. 11,361, due to her in respect of her fixed dower, Umed Ali conveyed the property in question amongst other properties to her absolutely. On the part of the plaintiff, it is said that this *hiba* was a mere benami transaction, and conveyed no estate in the property, and that as against the defendants he is entitled to the shares of Ahmed and Rohimunnessa, inherited by them from their father. It has been held as a matter of fact by the lower Court that the *hiba* was a benami transaction. But it is contended by the defendants that the plaintiff cannot recover, claiming as he does under Ahmed and Rohimunnessa, on the ground that they, his assignors, were estopped from disputing the validity of the *hiba*, and that he in this case cannot dispute it. The case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) has been cited on behalf of the defendants. And apart from the principles laid down in that decision, which was a

(1) 19 W. R., 292.

decision of the Privy Council, the circumstance of Ahmed Hossein having attested the deed of mortgage to Kalimuddin is relied on as estopping him from questioning his mother's power to execute the document, and a power-of-attorney executed by Rohimunnessa, amongst others, in favor of Ahmed, on the 17th December 1879, is relied upon as having a similar effect as regards her.

As to Ahmed we are unable to hold that the mere witnessing by him of that document, *i.e.*, the mortgage, or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the *hiba* to confer upon Azru, and the fact that Azru had no power to create, a good title as against him, of which knowledge on his part there is no proof. As regards Rohimunnessa, we need say no more than that we cannot consider the execution by her of the power-of-attorney above alluded to as having the effect attributed to it by the defendants. As to any other ground of estoppel affecting Ahmed and Rohimunnessa, it is true that in the proceedings on the Original Side of this Court in suit No. 601 of 1881, filed by Palkjan, for administration of Umed Ali Ostagar's estate, both Ahmed and Rohimunnessa did support the validity of the *hiba*, but there is nothing to show that their having done so, or their being about to do so, was ever communicated to the defendants by any one—certainly not by them. Indeed the defendant's purchase at the execution-sale took place before the written statements filed by them in the suit in this Court were presented by them.

Upon the whole, therefore, we do not find any circumstance in this case such as to justify us in holding (assuming it to be material) that Ahmed Hossein and Rohimunnessa were, by acts of their own, estopped from disputing as between them and the defendants the validity of the *hiba*, which is the source of their title.

The next question is whether in this case the decision of their Lordships of the Privy Council in *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) is an authority which we can apply in this case, so as to hold that Ahmed and Rohimunnessa, as heirs of Umed Ali Ostagar, became estopped as to

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the *hiba*. Now in that case, there were circumstances which do not exist in the present: there had been a long course of public acts and declarations by Ubotar Singh, the grantor of the deed of sale to his wife Ulpa, in that case was held to have been a benami transaction; and, further, Ubotar Singh, during his lifetime, as far as possible, by transfer of possession and otherwise, did all that he could to cause his wife to bear towards the public the character of owner. In the present case there was nothing save, *first*, the execution of the deed; *secondly*, the registration of it; *thirdly*, the execution of a general power-of-attorney by Azru in favor of her husband; and, *fourthly*, the fact that a seal was made for her, to constitute acts of the kind relied on in the case before their Lordships. And of none of them, save the execution of the deed itself, is it shown that the mortgagee or the present defendants were informed and aware. Again, before the sale on the 15th May 1882, in the suit in which that sale took place, the validity of the *hiba* was impeached by Palkjan, the plaintiff in the original suit in the High Court. It is true that Palkjan's claim was dismissed: still the fact that that claim was made was one that we understand the Additional District Judge to hold ought to have put the defendants upon enquiry. And although it is true that at that time the proceedings in the suit in the High Court did not contain an express denial by Palkjan of the validity of the *hiba*, the fact that he at least contested its validity, and that in the schedule to his plaint in that suit he included the properties in the estate left by his father, the administration of which he sought, must have appeared to the defendant had he made enquiry. Further, it is to be noted that there was no mutation of name in respect of this property to that of Azru Bibi, and there is nothing in the case to show that up to the time of the death of Azru's husband, she had (save in having executed that purely formal document, the power-of-attorney, under color of which affected authority the property was managed, *i. e.*, really enjoyed by her husband) anything to do with the possession of the property or the enjoyment of any of its profits. Under these circumstances, we cannot hold that the Additional District Judge—either in determining, as he has done, that no estoppel was created, or in holding, as he has done, that the defendants do not occupy the position of *bonâ fide*

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chasers without notice—was wrong; and this absolves us from considering the further question, which we might, perhaps, have otherwise found it necessary to determine, *viz.*, whether, if Ahmed and Rohimunnessa were estopped from disputing the *hiba*, that estoppel would have been one binding on the plaintiff in the absence of proof of knowledge on his part of the circumstances that gave rise to it.

We may add that we share the regret expressed by the Additional District Judge in coming to this conclusion in such a case. We would further say that we are sensible of the great importance of carrying out to the full the principle of the decision of the Privy Council in the case above cited, but that case does not go so far as to decide that the mere fact of a benami transfer in itself constitutes such a misrepresentation as to bind all persons claiming under the person who creates the benami, and, however salutary it might be that such should be the rule of law, we cannot hold that such a rule exists.

We, therefore, affirm the decree of the Additional District Judge, save as to that portion of it which orders the defendant to remove the wall built by him, for which we can see no warrant. As to that we must reverse the decree of the Court below. The respondent is entitled to remove the wall if it is on his land, but he is not entitled to a decree compelling the defendant to remove it. In other respects the appeal is dismissed with costs.

C. D. P. *Decree varied.*

Before Mr. Justice Mitter and Mr. Justice Macpherson.

AUBHOY CHURN MAJI (ONE OF THE DEFENDANTS) *v.* SHOSHI BHUSAN BOSE AND OTHERS (PLAINTIFFS.)*

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Appeal—Suit for Rent—Question as to amount of Rent—Sub-division of Tenancy—Rent receipts signed by one of several co-sharers—Bengal Tenancy Act (VIII of 1885), ss. 88, 153.

Several plaintiffs, co-sharers, sued two defendants to recover the sum of Rs. 78 odd for arrears of rent in respect of a tenure, the annual amount of rent payable being alleged to be Rs. 15. One of the defendants appeared

* Appeal from Appellate Decree No. 506 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 5th of January 1888, modifying the decree of Baboo Dukhina Churn Mozumdar, Munsiff of Diamond Harbour, dated the 20th of July 1887.

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and pleaded that the tenure had been some time previous divided by the principal plaintiff (who was the *kurta* of the family and collected the rent), and that after the division he had paid Rs. 7-8 per *annum*, being the rent in respect of his half of the tenure, to the *kurta*; in support of such payments he produced *dakhilas* or rent receipts signed by the *kurta*. The suit was dismissed by the Munsiff, but on appeal the Additional Judge gave the plaintiffs a decree for the amount of rent claimed less the amount proved to have been paid by the defendant who contested the suit, as shewn by the *dakhilas*. He held that the division had not been proved, and that the *dakhilas* did not amount to the written consent required by s. 88 of the Bengal Tenancy Act. The defendant appealed to the High Court, and at the hearing it was objected that, under the provisions of s. 153 of the Act, no appeal lay.

Held, that an appeal did lie, inasmuch as there was a question as to the amount of rent annually payable, the plaintiffs claiming Rs. 15 and the defendant alleging only Rs. 7-8.

Held, further, that the *dakhilas* or rent receipts did not amount to a written consent as required by s. 88 of the Bengal Tenancy Act, and that the decree of the lower Court must be upheld.

IN this case there were two defendants, and the plaintiffs sued to recover arrears of rent and for ejectment, alleging that the defendants held 5 bigahs of land at an annual rent of Rs 15; that they had not paid the rent from 1290 to 1293; and that there was a sum of Rs. 74 odd due to them on account of such rent, interest and cesses.

The defendant No. 2 alone contested the suit and pleaded that the original tenure had been sub-divided by the plaintiff No. 1, who acted as *kurta* of the family, and alone managed the property and collected the rent. He further pleaded that in respect of the 2½ bigahs of land, which had been allotted to him on the division, he had already paid the rent to plaintiff No. 1.

The other defendant did not appear or contest the suit. At the hearing of the case in the Court of first instance, the plaintiffs abandoned their claim for ejectment, and the only issues raised were: (1) Whether the defendant No. 2 had paid the rent as he alleged; and (2) whether the holding had been subdivided by plaintiff No. 1, and, if so, whether the division was valid.

The Munsiff found that the plaintiff No. 1 was the collecting agent of the plaintiffs, and that he had always granted *dakhilas*; that a division of the holding was effected by him in the way

alleged by defendant No. 2; and that the plaintiffs were bound by his acts. In proof of his allegation as to the payment of the rent in respect of his 2½ bigahs, defendant No. 2, in addition to other evidence, produced *dakhilas* purporting to be signed by plaintiff No. 1, which signature the latter denied. The Munsiff, however, found them to be genuine, and decided the first issue also in favor of the defendant.

Upon these findings the first Court held that the plaintiffs were not entitled to any relief and dismissed the suit with costs.

Upon appeal the Additional Judge reversed that decree. He agreed with the finding of the lower Court that defendant No. 2 had proved the payments of the rent alleged by him. On the other issue, however, he held in favor of the plaintiffs. The material portion of his judgment upon that point was as follows:—

"Defendant says Shoshi Bhusan made a separation in Choit 1291, and granted *dakhilas* accordingly, in which it was stated that defendant held 2½ bigahs at a rental of Rs. 7-8. I am not quite sure if this amounts to the written consent required by s. 88 of the Bengal Tenancy Act [see the case of *Gour Mohun Roy* v. *Anund Mundul* (1)]. But however that may be, I think that defendant's plea of separation must fail on the ground that Shoshi Bhusan alone granted the *dakhilas*. He is not the guardian of the minor plaintiffs, and I do not think that it is within the scope of a manager's authority to divide tenures or distribute rents. Shoshi Bhusan is not the *landlord* referred to in s. 88 of the Tenancy Act, but only one of the landlords. I think, therefore, that defendant is still bound to pay the rent of the whole tenure."

He accordingly gave the plaintiffs a decree for the rents of the tenure at Rs. 15 per annum less the payments proved to have been made by the defendant No. 2, as shown by his *dakhilas*, the decree being against both defendants.

Against that decree defendant No. 2 now appealed to the High Court.

Baboo *Karuna Sindhu Mukerjee* and Baboo *Jogendra Chunder Ghose* for the appellant.

Baboo *Bhobani Churn Dutt* for the respondents.

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At the hearing of the appeal a preliminary objection was taken that no appeal lay to the High Court.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

We think that in this case the preliminary objection taken to the hearing of the appeal should not prevail. Under s. 153, if there be a question as to the amount of rent annually payable by a tenant, then an appeal lies. In this case there was a question of that nature. The defendant (appellant before us) contended that the amount of rent payable annually by him was Rs. 7-8, and not Rs. 15 as claimed in the plaint. That being so, we overrule the preliminary objection. Upon the merits of the appeal it appears to us that the District Judge has disbelieved the oral evidence that was adduced by the appellant to establish that the distribution of the rent between himself and his brother was effected with the sanction of the landlord, and the District Judge was further of opinion that the rent receipts filed by the defendant appellant, which were genuine, did not amount to a written consent required by s. 88 of the Bengal Tenancy Act. In this view of s. 88 we concur. He adds that even accepting that the rent receipts are sufficient to bring the case within the purview of s. 88 of the Bengal Tenancy Act, still the receipts having been granted by Shoshi Bhusan, the *kurta* of the family, were not sufficient to bind the other members of it. I am not inclined to agree with the District Judge in that view, but he being of opinion that the oral evidence as to the sub-division of the rent and of the land of the original tenure with the sanction of the landlord is not trustworthy, and that the receipts did not amount to a written consent required by s. 88, it is immaterial to consider whether the act of Shoshi Bhusan, the *kurta* of the family, was binding in this respect upon the other members. We dismiss this appeal with costs.

H. T. H.

Appeal dismissed.